

# ENFORCING THE PEOPLE'S RIGHT TO KNOW

**W**hen Amendment 7 was enacted by the people of the State of Florida, its purpose was to allow medical records, previously kept secret under several statutes, to be accessible to patients who wanted to learn about an adverse medical incident. Yet, healthcare providers have continued to obstruct access. Pursuant to the Florida Supreme Court's decision in *Florida Hospital Waterman, Inc. v. Buster*, 948 So.2d 478, *Columbia Hospital Corporation of South Broward v. Fain*, 16 So.3d 236 (Fla. 4th DCA 2009), and *West Florida Regional Medical Center, Inc. v. See*, 2009 WL 3047396 (Fla. 1st DCA), it is well established by now that (1) Fla. Stat. 381.028.7b(1) cannot be used to limit the types of records that a healthcare provider would be required to produce under Amendment 7 and which relate to adverse medical incidents; (2) the Federal Healthcare Quality Improvement Act (HCQIA) does not preempt Amendment 7; (3) internal peer review is no longer protected at all; and (4) fact work product, as opposed to an attorney's opinion work product, is discoverable upon a showing of undue hardship and need.

Prior to the passage of Amendment 7, a hospital's incident reports had generally been considered protected as fact work product and discoverable only upon a showing of need and undue hardship. *North Broward Hospital District v. Button*, 592 So.2d 367, 368 (Fla. 4th DCA 1992); *Mt. Sinai Medical Center v. Schulte*, 546 So.2d 37 (Fla. 3d DCA 1989); *Bay Medical Center v. Sapp*, 535 So.2d 308, 312 (Fla. 1st DCA 1988); *Humana of Florida, Inc. v. Evans*, 519 So.2d 1022 (Fla. 5th DCA 1987). As the court noted in *Fain*, after the passage of Amendment 7, however, the trial court

should make a distinction between fact work product and opinion work product.

Fact work product traditionally protects information that relates to the case and is gathered in anticipation of litigation, and is subject to discovery upon a showing of need and undue hardship. Opinion work product consists primarily of an attorney's mental impressions, conclusions, opinions and theories. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994).

Amendment 7 does not protect secret committee peer review information. The purpose of Amendment 7 was to lift the shroud of secrecy from records of adverse medical incidents and make them widely available. *Fain*, 16 So.3d at 240. Amendment 7 was intended to allow discovery into an adverse medical incident. Pursuant to the amendment, a patient has the absolute right to discover records related to any adverse medical incident. The patient is entitled to discover the information, regardless of whether it is or is not part of the peer review process. 16 So.3d at 239-41. The Peer Review Statute no longer prevents a plaintiff from discovery into an adverse medical incident. In *Waterman, supra*, the Florida Supreme Court made clear that the limited discovery protections previously afforded by Florida Statutes were abolished by the passage of Amendment 7 as far as adverse medical incidents are concerned. *Waterman*, 984 So.2d at 488-89.

Healthcare providers cannot hide behind no longer extant statutory privileges. We know that after the passage of Amendment 7, some providers will attempt to avoid the amendment by failing to report in writing an adverse incident previously protected. There are, however, other ways to obtain this information through the use of all

of the discovery tools already in place in addition to the full force and effect of Amendment 7. <sup>1</sup>

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